No. 12759

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

M. P. BARBACHANO, *et al.*,

Appellants,

vs.

LAWRENCE W. ALLEN, *et al.*,

Appellees.

Reply Brief of Appellants M. P. Barbachano and the Border Electric and Telephone Co., Inc., a Corporation.

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Statement of Issues.

The BRIEF of WILLIS ALLEN raises the following issues:

(1) He claims that he did not benefit from appellants' investment of money and property induced by his fraud, and therefore does not come within the exception of Section 17a of the Bankruptcy Act (11 U. S. C. A., Sec. 35), viz. "liabilities for obtaining property by false pretenses or false representations . . ."

(2) He claims that appellants "made no contention in the court below" that $10,000 and $15,150 respectively out of the total judgment of $86,210.42 plus costs in their favor was for "wilful and malicious injuries to the person or property of another" within the meaning of Section

17a of the Bankruptcy Act. He therefore urges that this point may not be raised on appeal.

(3) He claims finally that if the foregoing point is properly raised in this appeal, the mentioned damages of $10,000 and $15,150 do not come within the meaning of the stated language of Section 17a.

ARGUMENT.

(1) Did Willis Allen Benefit From Appellants' Investment of Money and Property Induced by Willis Allen's Fraud?

(a) At pages 2 to 4 and 6 to 8 of WILLIS ALLEN'S brief, he refers to alleged statements or findings of the court below to the effect that WILLIS ALLEN did not benefit from the investment by appellant's induced by ALLEN'S fraud.

This is not a correct statement of the record. The sole finding of the trial court on this subject is contained in the following language of its ORDER [Tr. 143*]:

> "The Court finds that subsequent to entry of said judgment defendant, Willis Allen, filed a petition in bankruptcy in which petition said judgment was listed; that thereafter said Willis Allen received a discharge in bankruptcy and has been thereby released from the liability of the judgment."

Neither did the court below make the statements asserted by appellee—assuming for the moment that comments of the court below, not in the record, would have any place on appeal.

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*Tr. means Transcript of Record.

The sole hearing on the motion for enforcement of the judgment occurred on July 3, 1950 [Tr. 142], at which time WILLIS ALLEN served and filed [Tr. 141] his Affidavit in Opposition to Plaintiffs' Motion for Enforcement of Judgment, etc. *wherein the alleged bar of his discharge in bankruptcy was raised by him* [Tr. 130] *for the first time.*

Accordingly, the court below asked that the parties refrain from argument at this hearing on the issue regarding the alleged bar of bankruptcy and exceptions thereto, and that the entire matter be canvassed by both sides on briefs [Tr. 143]. This was done, and the ORDER of the court was made without further hearing.

There is therefore no basis in the Transcript of Record or in fact, for appellee WILLIS ALLEN's listing of purported statements or findings of the court below as given in his Brief.

(b) At page 11 of his BRIEF, appellee admits:

> "Appellees have no quarrel with any of the law enunciated in the cases cited by appellants in their opening brief herein. . . . There can be no doubt that if a bankrupt is benefited by reason of money or property which a creditor transfers to a third person at the request of the bankrupt or for the benefit of the bankrupt, the effect is the same as if the money or property had been received by the bankrupt himself."

ACCORDINGLY, TO THE EXTENT THAT THE JUDGMENT INCLUDES $61,060.42 OBTAINED FROM APPELLANTS AS A RESULT OF APPELLEE'S FALSE REPRESENTATIONS, FOR THE BENEFIT OF AN ENTERPRISE IN WHICH HE WAS COMMONLY INTERESTED WITH APPELLANTS, AND WOULD HAVE RE-

MAINED COMMONLY INTERESTED BUT FOR HIS OWN FRAUD, APPELLANTS SUBMIT THAT IT IS EXCEPTED FROM THE BAR OF WILLIS ALLEN'S VOLUNTARY BANKRUPTCY.

(i) In answer, appellee claims, first, that appellants' investments were made for their own benefit, rather than for the common enterprise contemplated by the agreement of March 30, 1936, in which defendants controlled an 80% interest.

The trial court found that from March 30, 1936, to October 5, 1936, when the agreement was terminated for fraud of the defendants including that of appellee WILLIS ALLEN, appellants duly performed their part of the agreement including investments in that period of around $30,000 pursuant thereto. [See citations to Transcript of Record, as contained from the middle of p. 5 to top of p. 6, of Appellants' Opening Brief.]

According to paragraph 5 of the agreement [Tr. 23], *these investments* (viz. *"suitable buildings and grounds to house the transmitter and studios, the use of suitable land for towers for new antenna; . . . your services in obtaining the license or concession from the government"* etc.) *were being furnished by appellants to "us", that is to say, to defendants including* WILLIS ALLEN; *and paragraph 9 of the agreement provided that defendants would own 80% of the stock in the corporation to be constituted to take over the enterprise.*

The trial court found that the appellants performed the agreement not only in regard to these investments, but likewise "all the other terms and conditions required by them, or any of them, to be performed un-

der said agreement" [par. XI of plaintiffs' Amended Complaint at Tr. 7, found to be true in par. VIII of the trial court's Findings and Conclusions of Law at Tr. 79-80]. Besides the detail conclusions to the same effect in its Memorandum of Conclusions [Tr. 67-68, 63, 62], the trial court found [Tr. 79-80]:

> "that in addition to procuring the concession for radio station and providing the suitable lands, buildings and electrical power facilities therefor and otherwise performing the terms and conditions of the contract annexed to plaintiffs' Amended Complaint as Exhibit 'A', plaintiffs caused radio station XEAQ at Rosarito Beach, Mexico, to be removed on or about July 19, 1936, in order to enable defendants to use the site thereof for construction of the new radio station, pursuant to said contract."

SINCE ALL OF THESE INVESTMENTS BY APPELLANTS WERE BEING MADE PURSUANT TO THE AGREEMENT, AND THE AGREEMENT CALLED FOR THEM TO BE MADE FOR "US", VIZ. DEFENDANTS INCLUDING APPELLEE WILLIS ALLEN, WHO WERE ALSO ENTITLED THEREBY TO 80% OF THE CORPORATION WHICH WAS TO TAKE OVER THE ENTERPRISE, SAID INVESTMENTS WERE CLEARLY FOR THE BENEFIT OF DEFENDANTS AS WELL AS PLAINTIFFS.

Appellee WILLIS ALLEN should not be permitted to take advantage of his own wrong, by arguing now that because the trial court eventually excluded him and his confederates from the common enterprise because of their fraud, that therefore the investments of appellants were not for his benefit.

(ii) Appellee argues, next, that the investments made by appellants after October 5, 1936, which was the date of termination of the agreement because of the fraud of the defendants, were not required by the concession from the Mexican Government previously obtained by appellants, and were therefore volunteered for their own benefit.

Suffice it that the trial court found directly to the contrary. Besides the detail in its Memorandum of Conclusions [Tr. 71, 71-72], the trial court in Paragraph XIII of its Findings and Conclusions of Law [Tr. 82], found to be true the following allegations of paragraph of the Amended Complaint [Tr. 11]:

> "By reason of said failure and refusal of defendants to perform said agreement *and to comply with the conditions of said concession, as aforesaid, plaintiffs were compelled to* and they did subsequent to on or about October 5, 1936, and up to on or about February 15, 1940, construct and complete said radio station at a cost of approximately $120,000.00, in addition to the cost of buildings, lands and electrical facilities hereinabove described, which cost of approximately $120,000.00 was at all of said times and now is the reasonable cost of construction and completion of said radio station." (Note: The only exception to the foregoing was that the trial court in said Paragraph XIII found that the actual and reasonable cost of construction was $144,697.88.)

It should also be noted that appellee's statement that the concession was not in effect until deposit of the bond on October 5, 1936, which was the date of termination of the agreement for defendants' fraud, is not accurate. The trial court stated [Tr. 63] in its Memorandum of Conclusions:

> "It further appearing that under the Mexican law said concession, although bearing date of August 31, 1936, *was effective as of the date of its delivery, to wit, September 19, 1936,* and under the terms and conditions of said concession and the law of Mexico said concession would have become void in the event of failure to deposit with the Mexican government 11,000 pesos or a bond in that amount *within fifteen days after the effective date of said concession.* . . ."

The Findings and Conclusions of the trial court are to the same effect [par. IX at Tr. 80].

IT IS THEREFORE RESPECTFULLY SUBMITTED THAT THE RECORD NECESSITATES THE CONCLUSION THAT $61,060.42 OUT OF THE TOTAL JUDGMENT FOR APPELLANTS IS FOR MONEY OR PROPERTY OBTAINED FROM APPELLANTS BY REASON OF THE FRAUDULENT INDUCEMENT OF DEFENDANTS INCLUDING WILLIS ALLEN, FOR THE BENEFIT OF SAID DEFENDANTS AS WELL AS OF APPELLANTS, AND IS THEREFORE EXCLUDED UNDER SECTION 17A OF THE BANKRUPTCY ACT FROM THE EFFECT OF WILLIS ALLEN'S VOLUNTARY DISCHARGE IN BANKRUPTCY.

(2) **Did Appellants Raise in the Court Below Their Contention That $10,000 and $15,150 Respectively Out of the Total Judgment of $86,210.42 Plus Costs in Their Favor, Was for "Wilful and Malicious Injuries to the Person or Property of Another" Within the Meaning of Section 17a of the Bankruptcy Act?**

(a) Appellee states:

> "Appellants made no contention in the court below that the discharge in bankruptcy of defendant Willis Allen did not release him from the obligation of the judgment because a portion of the total amount of the judgment was for wilful and malicious injuries to person or property. Such claim now made on appeal for the first time, is pure afterthought." (WILLIS ALLEN'S BRIEF p. 4; see also pp. 14-15.)

This is a misstatement.

Appellants' brief in the court below, which was their first opportunity to answer appellee's affidavit pleading the bar of bankruptcy, made the stated contention and supported it exhaustively. Although referred to in the Transcript of Record [Tr. 143], this brief is not in the Transcript for the reason that appellants now learn for the first time that appellee asserts that the contention was not made below and that appellants may therefore not argue it here.

To cure any possible technical difficulty thus created and in order that the Circuit Court of Appeals may have a true statement of the contentions made below in avoidance of the asserted bar of bankruptcy, appellants by separate motion are asking for this Court's order to incorporate appellants' Brief below, in the Transcript of Record.

(b) In this connection, the following facts appearing of record should be noted:

Appellants' Notice of Motion for Enforcement of Judgment, etc. was served on Willis Allen on April 13, 1950, and filed on May 5, 1950 [Tr. 111], being noticed for hearing on May 22, 1950 [Tr. 110]. Hearing was subsequently continued to July 3, 1950 [Tr. 142], but notwithstanding the ample time thus afforded appellee for his plea, the first time that he set up the plea of discharge in bankruptcy was by his Affidavit mentioned earlier above, served and filed at the time and place of the hearing itself [Tr. 141].

Accordingly, as noted earlier, the first opportunity appellants had for stating and arguing the exceptions of Section 17a of the Bankruptcy Act, in avoidance of appellee's plea, was, in accordance with the Court's instruction, in appellants' BRIEF below. While the fact of appellee's bankruptcy had been reported to appellants and was therefore incidentally mentioned, together with the exception for fraudulent inducement, in appellants' Notice of Motion for Enforcement of the Judgment, etc., this neither purported to be, nor was it a final statement of appellants' position on the subject.

The burden of pleading and proving discharge in bankruptcy is of course upon the party asserting it in bar (6 (Rev. Ed.) Am. Jur. 985), and the creditor is not in a position to answer the plea until it has been made (*ibid.*, at p. 1027). Due to appellee's delay in service and the instruction of the court below based thereon, appellants' answer in avoidance of the plea was made by their Brief below.

(c) Subject to the ruling of the Circuit Court of Appeals on appellants' concurrent motion to incorporate said BRIEF in the Transcript of Record, appellants quote the following from the commencement to page 2 of said BRIEF:

> "At the hearing of July 3, 1950 on the present motion, the Court stated that it was satisfied that plaintiffs have met the burden of proving reasonable diligence in enforcing their judgment.
>
> "The Court asked, however, that the parties present briefs with regard to the additional defense applicable only to the defendant WILLIS ALLEN, to the effect that the judgment is unenforceable against him because of his discharge in voluntary bankruptcy in 1943.
>
> "Inasmuch as the Affidavit of WILLIS ALLEN raising this issue was served on plaintiffs at the hearing, without opportunity for prior consideration by plaintiffs, they regard themselves as entitled by means of this Brief to present all reasons why discharge in bankruptcy does not bar enforcement of the judgment against WILLIS ALLEN, without regard to whether or not plaintiffs urged such argument at the hearing.
>
> "Plaintiffs submit that the judgment debt of WILLIS ALLEN on which this motion is founded was not affected by discharge in bankruptcy because it falls squarely within the second clause of section 17 of the Bankruptcy Act (Act of July 1, 1898, c. 541, 30 Stat. 550, 11 U. S. C. A. 35, as amended), which provides:
>
> " '*Debts not Affected By a Discharge.* A discharge in bankruptcy shall release a bankrupt from all of his provable debts, except such as . . . (second)

> are liabilities for obtaining property by false pretenses or false representations, or for willful and malicious injuries to the person or property of another . . .'"

Thereafter said BRIEF fully asserted and discussed each of the contentions now made on appeal, including the exception in Section 17a for "wilful and malicious injuries to the person or property of another" as applied to this case.

At page 13 of said BRIEF, it is stated:

> "IT IS SUBMITTED, THEREFORE, THAT INSOFAR AS THE JUDGMENT FOR PLAINTIFFS HEREIN IS BASED UPON DAMAGES IN THE SUM OF $10,000 and $15,150 for defendants' intentional interference with plaintiffs' commercial operations by wrongful attachment and defamation of PLAINTIFFS' TITLE TO THE RADIO STATION FLOWING FROM DEFENDANTS' CONSPIRACY TO THAT END, IT COMES SQUARELY WITHIN THE MEANING OF THE LANGUAGE OF THE SECOND HALF OF THE SECOND CLAUSE OF SECTION 17 OF THE BANKRUPTCY ACT, DENYING DISCHARGE AS TO 'WILFUL AND MALICIOUS INJURIES TO THE PERSON OR PROPERTY OF ANOTHER.'"

And the same point is reiterated in the CONCLUSIONS at pages 14 to 15 of said Brief.

It is therefore submitted that, contrary to the statement of appellee WILLIS ALLEN, this contention was made and fully set out below; perforce was overruled by the court below in finding that WILLIS ALLEN was discharged from the judgment herein by his bankruptcy; and is properly reviewable on appeal.

(3) Do the Damages Included in the Judgment in the Sums of $10,000 and $15,150 Represent Compensation to Appellants for "Wilful and Malicious Injuries to the Person or Property of Another" Within the Meaning of Section 17a of the Bankruptcy Act?

(a) Appellee claims [Tr. 19-20] that the

> "$10,000 was awarded to compensate plaintiffs for their expenditure of that sum of money in reinstating the concession after it had been cancelled by the Mexican government for failure to complete the construction within the time allowed therefor, the delay having been occasioned by the wrongful attachment. Therefore, it is clear that the $10,000 portion of the judgment referred to by appellants as having been an award of damages for wilful and malicious injuries to person or property, is not that after all, but instead is only an award of special damages arising because of the wrongful attachment."

The trial court found [see citations to the Transcript of Record at page 7 of Appellants' Opening Brief] that defendants including the appellee WILLIS ALLEN entered into a conspiracy to inflict, and succeeded in inflicting damage in the sum of $10,000 on appellants by wrongfully causing plaintiff's equipment to be attached so as to interfere with completion of the radio station within the time required by the radio concession and Mexican law applicable thereto, with the result that appellants had to invest an additional $10,000 to procure reinstatement of the concession.

This was wilful and malicious injury to appellants' property.

Appellee's argument appears to be, however, that unless the wilful and malicious injuries, in this instance by wrongful attachment, are to the very property which is wrongfully attached, Section 17a is inapplicable even though the intended result of that wrongful attachment, as found by the Court in this instance, was to injure the plaintiffs by causing them to lose other property.

The short answer is that Section 17a provides no such qualification on the meaning of the words "wilful and malicious injuries to property." The decisions with regard to the related language of the same section on fraud, show that such qualifications will not be read into the Act (see App. Op. Br. p. 14).

Moreover, the law with regard to causation in tort is not so qualified or restricted:

> " 'That which is the actual cause of the loss, whether operating directly, or by putting intervening agencies, the operation of which could not be reasonably avoided, in motion, by which the loss is produced, is the cause to which such loss should be attributed.'
>
> . . . . . .
>
> "Damages which accrue subsequent to the tort, but of which it is the primary cause, are not separate causes of action but 'are parts of the tort itself for which the cause of action is given.' " (*Hawthorne v. Siegel,* 88 Cal. 159, 25 Pac. 1114 (1891).)

(b) Appellee claims (his BRIEF at p. 18) that:

> "A close inspection of the Transcript shows clearly that the $15,150 portion of the judgment which appellants are now belatedly claiming was an award for slander of title, is not that at all, but actually is in-

stead a carefully and meticulously calculated award of damages for loss of radio broadcast advertising time."

Appellee cites in support of the foregoing, from page 74 of the Transcript, but in doing so, neglects the language almost immediately preceding, in the trial court's Memorandum of Conclusions at pages 73-74, to wit:

> "It further appearing that from time to time from and after October 5, 1936, and until the issuance of an injunction *pendente lite* herein restrained such acts, said defendants have notified various persons, including officials of the Mexican government, that they were the owners of said concession and of said radio station, also notified such persons that said plaintiffs were not the owners thereof but merely held possession of the same in fraud of the rights of said defendants, that likewise during said period and until thus restrained said defendants from time to time threatened to sue anyone doing business with said plaintiffs with respect to said radio station, also to attach any amounts which might become owing to said Radio Difusora Internacional from California advertisers using radio time on said station, *and that by reason of said statements, threats and acts of said defendants said Radio Difusora Internacional has been and still is unable to commence normal commercial operations of said station;* . . ." [See also Findings of the trial court, par. XV at Tr. 83.]

It is after thus concluding that the defendants intentionally prevented appellants from commencing operations, that the trial court then computes the resulting damage to appellants in terms of the advertising time they thus lost.

In summary, the trial court found that the damages of $15,150 flowed from the failure of commencement of appellants' operations:

> ". . . that said last-named plaintiffs have been deprived of such free broadcasts by the acts and conduct of said defendants, and that the value of such free broadcasts has been at the rate of $300 per month from and after January 17, 1937 . . ." [Tr. 75.]

It also found, first, that this failure of commencement of operations was due to the aforesaid "statements, threats and acts of said defendants" [Tr. 74], and second, that it would not have occurred "if said defendants had performed the terms and conditions of said contract of March 30, 1936, on their part to be performed . . ." [Tr. 74.]

Appellee should not be permitted to take advantage of his own wrong by arguing that he is not liable for tort damage within the exception of Section 17a, because that damage would not have occurred if he had complied with his contract.

Moreover, Section 17a does not qualify or restrict so as to exclude damage flowing from a tort, within the language of that section, because the measure of such damage may happen to coincide with the measure of a damage for which the same party may be liable on theory of breach of contract.

Conclusion.

The record shows without equivocation, tortious conduct of the defendants including appellee WILLIS ALLEN, in the nature of "obtaining property by false pretenses or false representations," and "wilful and malicious injuries to the person or property of another," within the meaning of Section 17a of the Bankruptcy Act.

It likewise shows that the judgment in favor of appellants in the sum of $86,210 together with their costs was based upon that tortious conduct.

Appellants do not deem it necessary or proper to reply herein to the gratuitious slur on them, not based on the record or related to the issues, contained in the middle paragraph on page 20 of WILLIS ALLEN'S BRIEF.

Appellants therefore respectfully renew their request for relief on appeal as contained at page 21 of their Opening Brief.

Respectfully submitted,

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